Department of Law Monthly Report

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In This Issue

Collections & Support

Collections Unit Receives $72,000 Toward Restitution Judgments

The collections unit opened 188 criminal and 26 juvenile restitution cases for collection. Eleven judgments were returned to the issuing courts due to insufficient information. Initial notices were sent to 248 recipients. Ninety-five judgments were paid in full, and satisfactions of judgment were filed. Payments were received totaling $63,493.79 toward criminal restitution judgments and $9,046.60 toward juvenile restitution judgments this month. Requests were made for 369 disbursement checks and 380 checks were issued to recipients.

Child Support Unit Wins Two Cases and Helps CSED Resolve Legal Accounting Problem

AAG Leroy Latta obtained a favorable decision in the Escobedo matter. In that case, CSED asked the court to modify Mr. Escobedo's child support obligation. Mr. Escobedo, a real estate salesman, argued that his second wife, who worked as his part-time office manager, was his de facto partner. Therefore, he claimed that half

of his income should be attributed to his wife and, thus, should not be included in his income for the purpose of calculating his child support obligation. The court agreed with the state that Mr. Escobedo could not legally split his commissions with his office manager under the law governing realtors.

AAG Latta also defeated an attempt by a child support obligee to characterize her interest in a property settlement as child support and, thus, to avoid having that debt discharged in the obligor's bankruptcy. We argued that characterizing a property settlement as child support was illegal. The court agreed and denied the obligee's request. Undaunted, the obligee filed a second motion to have the property settlement characterized as spousal support. The court again agreed with CSED and denied the second request as well.

AAG Pamela Hartnell assisted the court in structuring an offset of house payments against child support to create the least amount of confusion for the parties and to resolve accounting problems for CSED. Although CSED was not a party to the case, the father (who was the custodial parent) applied to CSED for services.

The order in question allowed an offset of the house payment that the father owed to the mother ($600 per month) against the child support payment that the mother owed the father ($502 per month). The difference in the two amounts created substantial accounting problems for CSED. Ms. Hartnell advised the parties that CSED could not enforce the order as written. In response, the father filed a motion requesting enforcement of the offset. Ms. Hartnell opposed the motion, explaining that the order, as written, simply could not be enforced by CSED, although the parties could do so on their own.

The court ruled in CSED's favor and, following Ms. Hartnell's suggestion, modified the order to set the child support obligation and the offset for the house payment at the same amount ($502 per month). The order required the father to pay the mother the balance of the house payment ($98 per month) directly, thus eliminating the requirement that CSED account for this balance.

Commercial & Fair Business

State Medical Board Revokes Physician's License, Disciplines Three PA's

The State Medical Board adopted the hearing officer's proposed decision and revoked the license of physician Miles Jones on April 1, 2004 at its regular meeting. The evidence presented at hearing by the Division of Occupational Licensing established that Jones, who at one time was licensed to practice in 23 states, has recently had his license suspended or revoked in several states due to unlawful internet practice. Rather than meeting face to face with patients he has treated over the internet, Miles has relied on patients' responses to questionnaires before prescribing drugs for them. Former AAG Roger Rom represented the Division in this proceeding.

Also on April 1, 2004, the Board adopted three memorandum of agreements ("MOA") between the Division and three physician assistants (PA's), Jennifer Oxford, Donna Hanson and Carl Brown Jr.,

all formerly employed by Samuel Schurig, D.O., whose license has been suspended since October, 2002. The PA's each admitted that they utilized prescription forms pre-signed by Schurig to issue prescriptions for schedule II controlled substances. PA's are prohibited under 12 AAC 40.450(b) from writing prescriptions for schedule II controlled substances. Under the MOA, each of the PA's received a written reprimand and paid a fine of $2,500. AAG Robert Auth represented the Division and negotiated the MOA's with the attorney for the PA's.

Board of Certified Direct-Entry Midwives Revokes Kodiak Midwife's License

On April 8, 2004, the Board of Certified Direct-Entry Midwives revoked the license of Kodiak midwife Susan Kathleen Short based on her breach of a prior memorandum of agreement ("MOA") she entered into with the Board in 2001. Under that MOA, Short agreed that her license would be suspended until she met mandatory continuing education requirements.

On May 21, 2002, the Division of Occupational Licensing invoked the automatic suspension provision of the MOA because an investigation revealed that Short had been practicing as a midwife during the period of her voluntary suspension. A hearing on the automatic suspension began in Kodiak on December 17, 2002, but was continued due to Short's illness. The hearing continued in Kodiak on March 13-14, 2003, and the hearing officer issued a proposed decision on October 16, 2003, finding that Short performed midwife services for payment while she was voluntarily suspended (and in one instance issued a false receipt to hide that fact). The hearing officer recommended that Short's license remain suspended for three years.

On February 27, 2004, the Board rejected the hearing officer's proposed decision under AS 44.62.500(c), choosing instead to decide the case on the record, and on the parties' written arguments, which were filed on March 23, 2004. While increasing the sanction from that recommended by the hearing officer, the Board adopted the findings of fact and conclusions of law from the proposed decision. AAG Robert Auth represented the Division at hearing and throughout this proceeding.

Environmental

Alaska Coastal Management Program (ACMP) Regulations Adopted

On May 3, DNR Deputy Commissioner Marty Rutherford adopted three new chapters of regulations in Title 11 implementing the reforms mandated by the Governor's ACMP reform

legislation, HB 191. AAGs Breck Tostevin and Bruce Anders worked closely with DNR in drafting the regulations. The draft regulations underwent public review on February 20, and DNR received extensive comments from the public.

AAGs Tostevin and Anders assisted in analyzing and responding to the extensive public comments, and revising the draft regulations. Tostevin revised and updated the 300-page "ABC List" of expedited consistency reviews and general permits that are adopted by reference in the regulations.

HB 191 mandates that the regulations go into effect on July 1 of this year. The Coastal Zone Management Act requires that NOAA then analyze the new regulations to determine whether they constitute an approvable coastal management plan change.

Human Services

Alaska Supreme Court Affirms Termination of Parental Rights of Incarcerated Parent

The Alaska Supreme Court affirmed the termination of an incarcerated father's parental rights to two children in *Stanley B. v. State*, No. 5793, issued on April 9. For the first time, the court interpreted the incarcerated-parent provision of AS 47.10.080(o)(3) and its parallel provision in AS 47.10.011(2). AS 47.10.080(o) authorizes the court to terminate a parent's parental rights when the parent is incarcerated for a significant period of the child's minority; there is no other parent available; and the incarcerated parent has not made adequate arrangements for the child. AS 47.10.011(2) authorizes the court to find a child to be in need of aid in similar circumstances, including the "adequate arrangements" provision.

The father had been arrested and incarcerated for a drug-related robbery shortly after his release from incarceration on previous drug-related charges. The children were in DFYS (now OCS) custody from the father's previous incarceration at the time of his arrest and re-incarceration in November 2001. During the course of the case, the father had provided DFYS with the names of several potential placements for the children. DFYS had declined to place with any of his suggested relatives for various reasons.

The father was sentenced to a six-year term shortly before the termination trial. There was no dispute that the six-year incarceration was a significant period or that there was no other parent available (the mother's rights had already been terminated). The trial court held that the burden was on the incarcerated parent, not DFYS, to make adequate arrangements for the care of the children during his incarceration, and the father had failed to do that. The father argued on appeal that he could not be required to make arrangements for the children because they were already in state custody when he was most recently incarcerated.

The Alaska Supreme Court held that the burden is on the incarcerated parent to make adequate arrangements for children, even when the children are in state custody at the time of incarceration. Because none of the father's suggested placements was facially adequate in light of DFYS's "more than reasonable" efforts to consider them, the father had failed to make adequate arrangements and the requirements of AS 47.10.080(o) were met.

Based on the same analysis, the supreme court agreed that the children were in need of aid under AS 47.10.011(2). The supreme court also upheld the trial court's finding that the children were in need of aid under AS 47.10.011(10), concerning the habitual or addictive use of an intoxicant. Although there was ample evidence of the father's drug addictions, including his own statements at trial, he had never completed any substance abuse treatment program.

In affirming the trial court's finding that DFYS had made reasonable efforts to provide family support services, the supreme court noted that the trial court could have dispensed with a reasonable-efforts finding under AS 47.10.086(c)(10) (regarding incarcerated parents).

Another issue the father raised in his appeal was an "ineffective assistance of counsel" issue. Applying the two-pronged analysis used in the criminal law context (*V.F. v. State*, 666 P.2d 42, 46 (Alaska 1983)), the court held that because the father had not shown how any of the alleged errors harmed his case, his claim of ineffective assistance was meritless. AAG Poke Haffner handled this trial and the appeal.

Alaska Supreme Court Upholds Terminations of Parental Rights Where Father Placed Child at Risk of Sexual Abuse

The Alaska Supreme Court issued another CINA decision in *Morgan B. v. State of Alaska, Dept of Health and Social Services.* The issue in the case was whether the trial court correctly found that the father placed the child at risk of sexual abuse, neglected the child, and abandoned the child. The court affirmed the trial court's finding that the father placed the child at risk of sexual abuse. It did not address the other grounds of neglect and abandonment. AAG Susan Wibker handled the case and AAG Toby Steinberger handled the appeal.

Supreme Court Grants State's Petition to Review *Native Village of Curyung v. State*

The Alaska Supreme Court granted the state's petition for review of a decision by Superior Court Judge John Reeves in *Native Village of Curyung v. State.* The court will review Judge Reese's ruling on the state's motions to dismiss.

Four villages from Western Alaska filed the superior court suit to challenge the way the state provides child protection services to its members. The state filed motions to ask that the case be dismissed because the state was immune from the villages' claims and because the villages were not entitled to bring the suit on behalf of their members. The state also argued that the federal laws that the villages relied upon in their complaint were not privately enforceable.

Judge Reese dismissed most of the claims against the state itself, and some of the federal law claims. The state then petitioned the Alaska Supreme Court seeking review of the adverse sections of Judge Reese's order. The court granted the petition and set a briefing schedule. AAG DAN Branch is handling this case.

Labor & State Affairs

Court Grants Injunction Against Alaska Labor Relations Agency Appointee

Juneau Superior Court Judge Larry Weeks granted a temporary restraining order prohibiting Jim Spalding from participating in proceedings as a member of the Alaska Labor Relations Agency. Governor Murkowski appointed Mr. Spalding to the agency as one of the two members with a background in labor, because Mr. Spalding had worked for the Alaska Public Employees Association for nearly three years as a senior labor representative in the 1980's.
A group of unions, including the Alaska Public Employees Association, sued Governor Murkowski and Mr. Spalding, claiming that Mr. Spalding did not have a background in labor, based on his more recent service as a representative of management in labor relations matters.

Judge Weeks granted the unions' request for a temporary restraining order and scheduled a hearing on their request for a preliminary injunction. Before the hearing date, however, Mr. Spalding elected to resign his appointment. AAG Dave Jones represented Governor Murkowski and Mr. Spalding in this case.

Court Holds COLA for PERS and TRS Recipients in Alaska is Unconstitutional

In *Gallant v. State*, Judge Suddock ruled that the cost of living allowance (COLA) paid to all PERS and TRS benefit recipients who reside in Alaska is unconstitutional. This case was brought as a class action claiming the COLA violates the right to travel under the state equal protection clause. The class argued the COLA should be paid to all benefit recipients without regard to residence. They also sought damages for failure to pay the COLA to non-residents in the past.

Although the court agreed that the COLA is unconstitutional, the court awarded the class only a fraction of the relief sought. The court did not award the class any damages and limited prospective relief to the relatively few non-residents who live in locations that have a cost of living higher than Alaska's. The ruling is contingent on the legislature amending the COLA statutes within a reasonable time to conform to the ruling; if the statutes are not amended, the COLA must be paid to all benefit recipients.

Legislation & Regulations

Legislature Advances to Adjournment; Regulations Approved

The legislation and regulations section spent a busy month advocating in both bodies of the legislature in favor of bills introduced or supported by the Murkowski Administration, responding to requests for editing of legislation and amendments, coordinating testimony on legal issues by

assistant attorneys general, monitoring key legislation for the Office of the Governor, and finalizing bill reviews on legislation pending the governor's action. The workload was greatly increased for these services during the month of April.

The following regulations projects received final edits and were approved for legal sufficiency before filing them with the Office of the Lieutenant Governor: 1) oil and hazardous substance discharge contingency plans (Department of Environmental Conservation); 2) public notification requirements for public drinking water systems (Department of Environmental Conservation); 3) construction contract claim arbitration procedures (Department of Administration); 4) Prince William Sound area fisheries, South Alaska Peninsula and Bering Sea - Aleutian Island area fisheries, and Yukon-Kuskokwim Region fisheries (Department of Fish and Game); 5) statewide weather vane scallop fisheries vessel entry permit and fees (Commercial Fisheries Entry Commission); 6) home and community-based waivers under Medicaid (Department of Health and Social Services); 7) numerous occupation licensing regulations (Department of Community and Economic Development); and 8) repeals of education regulations to conform to statutory changes (Department of Education and Early Development).

Natural Resources

Intervention Denied in Tustemena Wilderness Case

The state filed a reply to the plaintiffs' opposition to the state's motion to intervene in the Ninth Circuit in *The Wilderness Society, et al., v. United States Fish and Wildlife Service* in early April. As reported last month, this case involves whether a sockeye salmon enhancement project that has been ongoing for 30 years in Tustumena Lake in the Kenai National Wildlife Refuge is a prohibited "commercial enterprise" under the Wilderness Act.

An *en banc* panel of the Ninth Circuit reversed both the district court and the three judge Ninth Circuit panel, remanding the case to the lower court to enjoin the project. The *en banc* panel amended its December decision to give the district court discretion to allow USFWS to permit the release of the six million fry destined for Tustumena Lake for this year only.

The state moved to intervene for purposes of seeking certiorari in the U.S. Supreme Court. On April 6, the court denied the state's motion to intervene. AAGs Laura Bottger and Elizabeth Barry represent the state in this matter.

Alaska Supreme Court Upholds ADF&G Action on Farmers Harvest Of Wild Geoducks

On April 16, the Alaska Supreme Court decided an appeal dealing with aquatic farming and common property resources. In the lawsuit, plaintiffs had challenged the Department of Fish and Game's (ADF&G's) refusal to issue them permits to operate aquatic farms at sites where there are large populations of naturally-occurring shellfish, in this case, geoducks (pronounced "gooey-ducks"). The plaintiffs intended to harvest and sell the "wild" geoducks without any further

cultivation.
Before the superior court, the state argued that neither the aquatic farming statutes nor the "equal access clauses" of the Alaska Constitution allow farmers to have an exclusive opportunity to harvest, without further cultivation, common property fishery resources found on their farms. Judge Thompson's decision generally supported ADF&G. Interpreting the constitution, he ruled that the plaintiffs may only harvest "insignificant" amounts of wild geoducks, leaving it up to ADF&G to determine how much that is.

The plaintiffs appealed the superior court ruling, and then stayed their appeal when it appeared that a settlement might be reached with ADF&G. When there was no settlement, the plaintiffs reactivated their appeal and, at the same time, pressured ADF&G to implement the lower court decision. They insisted that the department adopt standards defining "insignificant" and issue them permits that would authorize them to harvest insignificant amounts of geoducks.

In its opinion, the supreme court did not address the constitutional issue, but instead, upheld ADF&G on statutory grounds. The court concluded, " In short, no provision of the aquatic farming act empowers the department to grant - or entitles the holder of an operation or stock acquisition permit to claim - exclusive rights to harvest and sell existing wild geoduck stocks."

Two former AAGs, Shannon O'Fallon and Blaine Hollis, represented ADF&G in this matter.

Special Fish Board Meeting on Prince William Sound Salmon Allocation

AAG Lance Nelson participated in a special meeting of the Board of Fisheries April 4-5 called to address possible amendments to the Prince William Sound commercial salmon fishing allocation plan. The Board made some minor amendments, but did not make the more fundamental changes sought by the purse seine operators.

Oil, Gas, & Mining

Subpoenas Requesting Production of Confidential Tax Information By City of Valdez Quashed

The Anchorage oil, gas and mining section successfully quashed two subpoenas that the City of Valdez served on DOR personnel to compel production of numerous confidential tax records in a case to which the state is not even a party, *SeaRiver Maritime and Polar Tankers, Inc. v. City of Valdez*. The state moved to quash on grounds that the requested records were privileged from disclosure under AS 43.05.230, which precludes officers of DOR from divulging confidential tax information except in specified limited circumstances, which did not apply in this case.

The superior court first denied the motion to quash, but on a motion for expedited reconsideration, the court granted the motion and quashed the subpoenas (the request for reconsideration was filed, heard and decided on the same day that the order denying the motion to quash was issued). The court did allow Valdez to depose the director of the tax division, but only as to procedural matters that did not involve particular taxpayers.

Oil and Gas Exploration, Production, and Pipeline Transportation Property Tax Appeals

During March and April the oil, gas and mining section assisted the DOR Tax Division in deciding 16 property tax appeals in informal conferences. The appeals were mostly from the 2004 property tax assessments under AS 43.56, but a number were taken from recently completed three-year audits under AS 43.56. Six taxpayers have appealed DOR's informal conference decisions to the State Assessment Review Board. The O&G section is assisting DOR to prepare for the board's hearings scheduled to begin May 18.

ExxonMobil Royalty Reopeners in Arbitration

AAGs Wilson Condon, Leonard Herzog, and Richard Todd of the oil, gas, and mining section have been negotiating three royalty reopeners against ExxonMobil since mid-2001. Royalty reopeners are arbitration proceedings regarding methodologies for determining the amount due to the state in oil and gas royalties. The three reopeners involve determining destination value, losses, and transportation costs.

The section team recently resolved the losses reopener by convincing ExxonMobil to change its loss factor for oil in transit from Alaska to the West Coast from .007 to .0016. This is worth approximately $2.9 million to the state for the period 2001 through 2003. The destination value and transportation reopeners remain active. They will probably go to hearing next year.

Negotiations and Contract Development under Stranded Gas Act Continue

The state has been in negotiations and contract development with the major North Slope producers, the Alaska Gasline Port Authority, and various pipeline companies. The negotiations and contract drafting are particularly complex because the Stranded Gas Act is broad enough to encompass sweeping changes to the State's fiscal system in order to improve the economics of a gasline project.

State Argues Municipality Liable for Production Taxes

Former AAG Martin Shultz argued a case before the Alaska Supreme Court on the issue of the liability of the Anchorage Municipal Light and Power for gas production taxes for gas used to generate electricity. ML&P argued that it is exempt from production tax because there is no explicit provision in the production tax statute making it applicable to municipalities. The state argued that the production tax statute can, logically, only be read to include municipalities. A decision is pending.

Torts & Workers' Compensation

State Health Care Providers Granted Judgment in Prisoner Malpractice Claim

Two individually sued health care providers were granted judgment dismissing plaintiffs' claims in a DOC medical malpractice case filed by Donald and Rita Hymes. Mr. Hymes, a federal prisoner, was briefly incarcerated at Fairbanks Correctional Center while hearings occurred on his federal criminal case. He alleged that he was negligently treated for his medical problems. His wife alleged loss of consortium claims based upon her inmate spouse's claims. The two health care providers moved for summary judgment based upon their expert's affidavit that there was no failure of care and no resulting damage to plaintiff. AAG Gail Voigtlander defended the case.

State Files Brief in Case Defining ActionableTort Duties Concerning Petition for Guardianship

The State filed its Appellee's brief in *Trapp v. State*, *OPA*, defending a grant of summary judgment at the trial court level. The trial court held that OPA conservators did not owe an actionable duty to petition for a guardianship for their "protected person." The key developing issue on appeal is whether OPA conservators owed other duties under statute or common law, such as the duty to notify Adult Protective Services that the protected person was at risk, even though OPA was only appointed as conservator, for a person who had only periodic and episodic disabilities. The case implicates a much larger role for OPA if the supreme court imposes the duties sought by appellant in this matter. Oral argument is set for September.

Transportation

Transportation Section Welcomes New AAG Jason Crawford

The Transportation Section welcomes Jason Crawford to its Fairbanks office. Jason came to the section after serving both state and federal court clerkships for Judge Beistline.

Superior Court Affirms Finding That Contractor Misrepresented to Dupe State of $400,000

A contractor lodged a claim against the Department of Natural Resources for approximately $2.4 million in additional compensation related to a mine reclamation project. Following an approximately four week hearing, Hearing Officer (and former judge) Rowland denied the contractor’s claim and found the contractor intentionally misrepresented the quantities of materials it had excavated in order to secure payments to which it was not entitled. The hearing officer found the contractor owed the state approximately $400,000.

The Commissioner of DOT&PF, reviewing the claim in accordance with the state procurement code, adopted the hearing officer’s finding. In April 2004, Superior Court Judge Michalski affirmed the commissioner’s decision. Former AAG Ross Kopperud represented DNR.

Master’s Hearing Held in Parks Highway Condemnation Case

DOT&PF condemned land along the Parks Highway near Wasilla to construct a freeway. A landowner contested the amount DOT&PF paid for his commercial property. AAG Gary Gantz represented DOT&PF in a two-day hearing on valuation before Special Master Ken Gain.

Settlement Reached in $625,000 Utility Relocation Claim

A telephone utility relocated a cable to accommodate a DOT&PF highway project. A subcontractor filed suit against an electrical contractor, claiming additional costs related to drilling under the Chistochina River. The electrical contractor filed a third-party action against the telephone utility, which filed a third-party action against DOT&PF based on a statute requiring DOT&PF to pay the reasonable costs of utility relocations caused by highway projects.

The parties resolved this approximately $625,000 claim at a two-day mediation before former Judge Rowland. DOT&PF agreed to pay $182,500 to the subcontractor. The electrical contractor and the telephone utility provided another $35,000 to the subcontractor. AAG Susan Urig represented DOT&PF.

Hearing Conducted in Deadhorse Airport NANA Lease Appeal

NANA Regional Corporation appealed the increase of rent for a parcel on the Deadhorse Airport. AAG Leone Hatch represented DOT&PF's Northern Region Aviation Leasing Office in an administrative hearing before a hearing officer appointed by DOT&PF's Commissioner's Office. A decision has yet to be issued.

Criminal Division

ANCHORAGE

The Anchorage office presented 35 cases, involving 40 defendants, to the grand jury. Six cases went to trial during the month, with five felony convictions and an acquittal in a misdemeanor case.

Assistant District Attorney Adrienne Bachman convicted Talalelei Edwards of murder in the second degree in a shaken baby case. Edwards was a baby sitter who stayed home caring for his own child and the child of a neighbor. The medical testimony showed that the injuries that caused the child's death would have been inflicted during the time Edwards was babysitting the child. The defense called nationally known defense expert Dr. Janice Ophoven to say that the baby sustained the fatal injuries five to seven days earlier.

ADA Steve Wallace convicted Brion Williams of sexual abuse of a minor in the third degree. In the spring of 2002, Williams, the athletic director and basketball coach at a Christian school, recruited a seventeen-year-old female basketball player to come to his school for the 2002-03 basketball season. In September, 2002, after she started at his school, he had sex with her. He defended on the ground that even though he was her coach, he was not in a position of authority because the basketball season had not started.

ADA Keri Ann Brady convicted Gerald Mahle of fourteen counts of delivery of various drugs, and

violations of conditions of release. Mahle had been charged with delivery of oxycontin and hydrocodone and had been convicted of some counts, but the jury hung on other counts. While free on bail awaiting re-trial on the hung-jury counts, he sold drugs again to others. So this time, he was convicted of both the hung-jury counts and the new charges. While he was out awaiting re-trial and dealing again, he left the custody of his third-party custodian and got convicted of that, too.

ADA Pat Hanley convicted Frank Guertin of a residential burglary. The homeowner was awakened in the night by the sound of someone in his basement and, armed with a shotgun, went to his basement to investigate. Guertin grabbed the barrel of the shotgun, but the homeowner resisted the temptation to shoot and, instead, beat Guertin with the barrel of the shotgun and held him until police arrived.

In another trial, ADA Ben Hofmeister convicted Saul Shiedt of felony DUI.

BETHEL

Kwang Kim was convicted of felony possession of alcohol with intent to sell after a jury trial. He was found in possession of 72 bottles of alcohol in Bethel.

A man was found not guilty of misconduct involving a controlled substance in the third degree after a jury trial.

In the grand jury during the month of April the following were indicted: one person for assault in the first degree, three persons for assault in the third degree, one person for sexual assault, two persons for sexual abuse of a minor in the second degree, one person for sexual abuse of a minor in the third degree, and one person for attempted sexual abuse of a minor. One person was indicted for burglary in the first degree and three persons were indicted for burglary in the second degree. There were three people indicted for theft in the second degree, one person for misconduct involving weapons and one person was indicted for misconduct involving a controlled substance in the fourth degree.

KENAI

Our office was shocked and saddened by the death of ADA Jake Ketscher. We appreciate everyone's kind sympathies, with special thanks to Bob Linton, John Novak, and Mike Gray for coming to Kenai to be at the memorial services. And we continue to thank all of the attorneys who come to our aid on a weekly basis and those attorneys who stay home and help carry the load so that their co-workers can come here.

KETCHIKAN

Ty Douglas was sentenced to 45 years with 13 years suspended on two convictions for sexual assault in the first degree. At previous hearings, Douglas was very disruptive by yelling and once spitting on people watching in the audience. Judge Weeks had warned Douglas that any disruption at the sentencing would result in his being removed from the courtroom and placed in

another room where he could listen on a telephone extension. When the sentencing began, Douglas yelled obscenities and made death threats to the victim. Judge Weeks had him removed to the jury room next door where he could listen on the telephone. Douglas continued to yell. Judge Weeks found that Douglas was so dangerous that he should spend the rest of his life in jail for protection of the public.

A Ketchikan jury convicted Steven Loucks of drunken person on license premises and failure to appear. In another case, although acquitting him of assault in the fourth degree, a Ketchikan jury convicted Benjamin Edenshaw of disorderly conduct and violating conditions of release.

A man tricked an employee of a local business into giving him a key, and when the employee later returned he found the man at the cash register stealing money, resulting in an indictment for burglary in the second degree and theft in the third degree.

A man stepped out of the pan and into the fire, when he tried to avoid a traffic ticket by lying at his court trial and submitting a fake document. Unfortunately for him, the troopers were able to prove he had lied and that the document was a fake. He was indicted for four charges of perjury and one charge of forgery in the second degree.

Two men were indicted for sexual abuse of minor in the second and third degrees for engaging in sexual acts with a 14-year-old girl. Under a Glass warrant, the victim talked with both defendants while the troopers recorded the conversations, and both admitted to using condoms when they had sexual relations with the victim but asked her not to tell because they would get into trouble, which they did.

A man was indicted for “playing” with his girlfriend's very young children by grabbing their genitals, until his girlfriend caught him. She agreed to wear a wire and the man admitted to grabbing their genitals, apologized, and said it would never happen again. He was then arrested and was indicted for five charges of sexual abuse of minor in the second degree.

A man was indicted for robbery in the second degree. Others were indicted for criminal mischief in the third degree, driving while intoxicated, forgery in the second degree, theft in the second degree, issuing bad check, burglary in the first degree, misconduct involving controlled substance in the fourth degree, failure to stop at direction of peace officer, assault in the third degree, and failure to register as sex offender.

KODIAK

The mother and father of a 19-year-old man on felony probation were indicted for hindering prosecution after they were found to be hiding their son at home when police were trying to serve an arrest warrant. The first time the police came by the house they denied their son was there. The police kept an eye on the house and, when they knocked on the door about six hours later, the mother and father closed their blinds, turned up the volume on their television, and refused to come to the door. When entry was forcibly obtained, their felon son was found hidden under a pile of blankets in the back room. The son admitted to multiple probation violations and had 35 months of his suspended time imposed. A May trial date was set against the parents.

A Kodiak resident was sentenced to seven years in prison, with four years suspended, and placed

on probation for five years following his conviction for misconduct involving a controlled substance in the third degree. His sentence was aggravated by a prior out-of-state felony conviction from the mid-1980s. This defendant had been convicted for helping run a budding Kodiak meth lab. Charges against his co-defendant partner remain pending.

A 19-year-old Kodiak resident was convicted of misconduct involving a controlled substance in the fourth degree, when found to be in possession of cocaine during a traffic stop. This defendant was sentenced to serve 90 days in jail and placed on probation for three and a half years. Thanks to the Anchorage District Attorney's Office for prosecuting this case when both Kodiak prosecutors had to step aside because of their friendship with the defendant's father.

KOTZEBUE

Acting on a tip, members of the WAANT Unit contacted police who seized a small amount of marijuana from a suspected seller. The suspect told the police where he bought the marijuana and, after obtaining a search warrant, the police went to another residence, where they found several baggies of marijuana and $7,000 in cash inside a padlocked refrigerator. A Kotzebue man was arrested on a number of misdemeanor and felony drug charges.

Another Kotzebue man was arrested for fourth-degree domestic violence assault and misconduct involving a controlled substance in the fourth degree. The victim of the assault not only told police what he had done to her, but also gave them a container with 11 small baggies with cocaine residue, metal spoons, lighters and other items which belonged to the suspect.

A man was arrested for attempted sexual assault in the first degree and assault in the fourth degree. He was charged with attempting to sexually assault a 65-year-old woman, and for hitting a man who tried to stop the attack. When another male in the residence attempted to stop him, the defendant punched him twice in the face.

With the help of DNA testing, a Point Hope man was indicted for sexual assault in the second degree and incest.

NOME

In an alcohol-fueled domestic assault in Koyuk, a man pointed a rifle at his girlfriend. The rifle later discharged during the altercation resulting in charges of assault in the third degree and related misdemeanors. Also charged in a domestic case was a man indicted for assault and stalking after showing up at his estranged girlfriend’s house and threatening to kill her. Those charges were added to an earlier burglary (occurring at the same residence) and an escape charge. The “fatal attraction” theme continued in yet another case, resulting in the indictment of a woman for burglary and criminal mischief, for breaking into a former boyfriend’s residence, cutting up the furniture, and generally trashing the place. Fortunately, no bunnies were boiled.

PALMER

Andrew Coffman was sentenced to 18 years in prison and to pay $10,698 in restitution on charges of attempted murder, assault in the third degree and stalking in the second degree. Coffman had become obsessed with a co-worker and found that she was staying at the house of her boyfriend’s

grandmother and went there. The boyfriend went to investigate noises outside the house, and Coffman pointed a gun at him. The boyfriend ran back into the house with Coffman in pursuit, and when Coffman entered the house, the grandmother pointed her gun at him and told him to leave. Coffman shot her in the face. Police found Coffman hiding under a vehicle in the area. Coffman also violated conditions of release when he left his parents' home and contacted the co-worker. Two days later he was arrested in the Yukon Territory, armed with a .44 magnum revolver.

Jason Geisler was sentenced to serve seven years in prison for his participation in a car-jacking robbery. Geisler, who was 17 at the time of the offense, denied involvement in the crime and was convicted by a jury last October. Geisler had a lengthy juvenile record and was released from a youth center for only a short time before the robbery; the court also found that the crime was gang-related.

Ralph Gaston was sentenced by a three-judge-panel to 14 years, with 6 suspended, for abusing his daughter over a period of twelve years. The assistant district attorney assigned to the case opposed sending the case to the panel and argued for a sentence of 15 years to serve. Despite ruling that the aggravators in the case negated any extraordinary potential for rehabilitation, the panel did find that Gaston was extremely remorseful.

George Huffman was convicted by jury of felony driving while intoxicated. He denied driving. However, an independent witness corroborated the victim's testimony that Huffman switched seats with his girlfriend after hitting the victim's car in a car-wash parking lot.

A man was indicted on multiple counts of sexual abuse of a minor in the first degree. The charges stem from the abuse of his stepdaughter over a period of 10 years. The stepdaughter disclosed the abuse after a neighbor reported that the same man also abused her. The man was charged with sexual abuse of a minor and possession of an illegal weapon. Thousands of images of child pornography were also recovered, pursuant to a search warrant, from his home computer.

Three defendants were indicted in Glenallen cases. A man was indicted on two counts of attempted murder, two counts of assault in the first degree and ten counts of assault in the third degree. In a drunken rage, the man stabbed two people, threatened others and held the knife to a girl's throat so she would not call 911. Another man was indicted on felony burglary and assault charges, after he found his wife naked in another man's house. He stabbed the man multiple times in the buttocks and caused substantial damage to the other man's vehicle. Another man was indicted on a manslaughter charge after he drove under the influence of alcohol, lost control of his car and hit a number of mailboxes and a guardrail. A mailbox post went through the windshield, killing his passenger.

A man was indicted on charges of manslaughter, criminally negligent homicide, and assault in the first degree, and a co-defendant was indicted on the charge of hindering prosecution in the first degree. This case involved a vehicle rollover, which resulted in the death of a 5-year-old girl and injuries to her younger sister. The troopers referred the case over to the Palmer District Attorney's Office, recommending that the mother of the victim be charged for the death. Further investigation by the Palmer District Attorney's Office in preparation for a grand jury revealed that the mother's boyfriend was actually the driver of the vehicle and was intoxicated at the time. The mother lied to the investigating troopers, saying she was the driver, because the boyfriend was on felony probation. After this discovery, further efforts by the Alaska State Troopers and the Department of

Corrections resulted in the proper charges being brought against both.

OSPA
(Office of Special Prosecutions & Appeals)

A 17-million-dollar restitution judgment was entered against Daniel Carson Lewis for costs incurred by Alyeska Pipeline Service Company after Lewis shot a hole in the pipeline.

Palmer bail bondsman John Elder pled no-contest to one count of scheme to defraud and to two counts of theft in the second degree. Elder routinely over-charged bail clients and pocketed money that should have gone to his employer. He will receive six months in jail, five years probation, and must pay back approximately $35,000 in restitution as a condition of his probation.

Fellow embezzlers Thomas Rickard and Susan Karge were sentenced in Anchorage court for their roles in embezzling over $360,000 from their employer over a number of years. Susan Karge, who was challenging her portion of restitution, probably did not help herself when she put her husband on the stand. On cross-examination, he admitted not reporting substantial amounts of income to the IRS and to concealing his employment from the state to collect unemployment benefits. The defendant was advised that he was admitting to crimes and Judge Card struck the testimony in its entirety after the witness belatedly invoked his Fifth Amendment privilege.

Douglas Bartco, a Palmer pharmacist and owner of TKO pharmacy, pled guilty to medical assistance fraud and received 90 days suspended, a $1,000 fine, and was placed on three years probation. He also surrendered his DEA certificate. An investigation by the Medicaid Fraud Control Unit revealed that Bartco had been double and triple billing the state for drugs.

Andrea Travis pled to theft in the third degree for welfare fraud that occurred in 1990-91. Travis moved to Arkansas before charges were filed against her and has remained since. She received six months suspended, three years of informal probation, and must pay $3,345 in restitution.

Toni Rosenthal pled to theft in the second degree for welfare fraud that occurred in 2000-01. She was sentenced to 24 months with 12 suspended, 5 years formal probation, and $3864 in restitution.

Petitions & Briefs of Interest

Briefs of Interest

Definition of medical treatment for purposes of third-degree assault statute. Under AS 11.41.220(a)(1)(C)(i), it is a third-degree assault to recklessly cause physical injury to a child where the injury reasonably requires medical treatment. The state argues that the term "medical treatment" includes diagnostic as well as therapeutic care in a case where the child's head injury, when discovered, required only a CAT scan to rule out serious brain trauma. The state makes this argument on the basis of the common understanding of the term "treatment" as well as legislative history suggesting that the term "medical treatment" was added to differentiate between physical injury (the infliction of pain without any other physical consequences), and more serious injuries that might not qualify as a serious physical injury. *Wells v. State*, No. A-8645/A-8661.

Challenge to refusal to grant immunity to a defense witness. The defendant claims that the judge should have dismissed the prosecution after the state refused to grant immunity to a defense witness; for this proposition, the defendant relies on *State v. Echols*, 793 P.2d 1006 (Alaska App. 1990) (holding that a court had the power to dismiss a case where the state refused to immunize a critical defense witness). The state argues that *Echols* has been implicitly overruled by *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993), which held that only transactional immunity could satisfy a witness's Alaska self-incrimination privilege. *Echols* was based on the assumption that use-and-derivative-use immunity would satisfy a witness's self-incrimination privilege. Thus, a grant of immunity did not preclude all prosecution of the witness. Further, the state argues that the witness in the particular case was not a critical defense witness like the witness in *Echols*. *Cogdill v. State*, A-8541.

Admissibility of animal cruelty evidence. Following the defendant beating the victim to death with a baseball bat, he took the victim's cat and placed it in a microwave oven and turned on the power. The state argues that the defendant's conduct toward the cat was admissible to show the defendant's state of mind when he killed the victim, to disprove the defendant's heat-of-passion defense, and to corroborate the defendant's confession. *Abuhl v. State*, A-8534.

Statute and Rule Interpretations

AS 12.55.155(c)(1) aggravating factor for resulting serious injury. The court of appeals construed the aggravating factor under AS 12.55.155(c)(1) – a person sustains serious physical injury as "a direct result" of the defendant's conduct – as not applying to the defendant who sells illegal drugs to a customer who then dies from an overdose on the drugs. The court said that the legislature's use of the term "direct result" implied that the defendant's conduct had to be more than a proximate cause of the victim's injury or death. *Whitesides v. State*, Op. No. 1921 (Alaska App., April 2, 2004).

Evidence Rules 702 and 703 and expert scientific testimony. The court of appeals interpreted Evidence Rules 702 and 703 to permit a trial judge to preclude an expert from testifying on the basis of data that would not meet the *Daubert/Coon* test for admissibility of scientific evidence. The issue arose where the defense proposed to have an expert testify about a conclusion he had

based in part on the defendant's blood-alcohol result from a portable breath-testing device, when the defendant did not establish the scientific validity of the result obtained from that portable device. *Guerre-Chaley v. State*, Op. No. 1924 (Alaska App., April 9, 2004).

AS 11.81.900(b)(4) and applicability to propelled vehicles. Under AS 11.81.900(b)(4), a building is defined to include not only its usual meaning, but also "any propelled vehicle or structure *adapted for overnight accommodation of persons or for carrying on business*." (Emphasis added.) The court of appeals concluded that the emphasized language modified the term "propelled vehicle" as well as "structure" in the statute. *Timothy v. State*, Op. No. 1928 (Alaska App., April 30, 2004).